No. 83-856

IN THE

Supreme Court of the United States

DORIA MINING AND ENGINEERING CORPORATION, a Corporation,

Petitioner,

vs.

JAMES G. WATT, etc., *et al.*,

Respondents.

BRIEF OF RESPONDENTS, STATE OF CALIFORNIA AND CALNEV PIPELINE CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The factual matters appearing at pages 2, 3 and 4 of Doria's Petition are generally accurate. However, under the heading "Opinions and Decisions Below" there is omitted any reference to the exhaustive opinion of the Interior Board of Land Appeals, dated October 31, 1974, affirming the decision of Administrative Law Judge Graydon E. Holt. Respondents include the decision below in their brief as Appendix I.

Statement of the Case.

At pp. 11-18 of the Petition, Doria has summarized in a selective, argumentative and misleading form, certain items of testimony and evidence heard by the district court. For example, some, but not all, of the Schroter samples were insufficient in rock content to perform individual LART tests. For this reason, the decision was made to composite some of the samples. Mr. Schroter accepted this decision

because, in his judgment, the claim area was essentially homogeneous. (RT 1822)[1] Mr. Schroter repeatedly so testified at the agency hearing. (RAH 236, 238, 239) Most importantly, Mr. Schroter never conceded, throughout his lengthy examination as an adverse witness, that his samples were nonrepresentative of material on the claims, or that his sampling technique was deficient in any way.

At pp. 11-12 of the petition, Doria falsely asserts the Caltrans lab "illegally" altered its procedure by "destroying" the reverse side of the original test sheets. Messrs. Rundle, Pitts and St. Claire testified that the lab policy was to retain original test sheets for about one year before the sheets were discarded. (RT 330, 331, 733, 964, 968) The district court correctly found there was no sinister or ulterior motive in adhering to the longstanding policy. (Pet. Appen. "D," p. 44a) Assuming a one year retention, the original test sheets were in existence and available during the six day agency hearing in April and May 1973.

In its attempt to prove a sinister scheme in the destruction schedule, Doria has appended a documents retention schedule of the California Department of Transportation dated eight years after the year in question. (Pet. Appen. "C") This document was clearly irrelevant to the year in issue. No retention schedule for the year 1972 applicable to the Caltrans lab in District 8 could be found. Doria offered the 1980 retention schedule and the testimony of Ms. Haglund purportedly to impeach Mr. Pitts, the lab supervisor. However, Ms. Haglund testified that the retention schedule for lab test sheets was five years for the *Headquarters* lab and that this schedule was *not* uniform throughout the districts statewide, and that Headquarters never directed that its re-

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[1]The following abbreviations will be used for references to the record below: "RT" for Reporter's Transcript; "RAH" for the agency hearing.

tention schedule be made uniform for other labs. (RT 1089-90) Further, the category of "work cards and Test Reports" (Item No. 8 of the schedule) clearly refers to "Headquarters" policy. The allegedly spurious insertion after Item No. 4 "includes work cards and tests" was intended to clarify the district policy. But counsel for Doria never sought to elicit from Mr. Vidor *who* made the insertion or *why* it was made. So much for the "perfidy" of counsel.

Regarding the Caltrans lab test procedure challenged by Doria, no witness from the lab testified it was "illegal" to composite material from a homogeneous area. No witness from the lab testified that the weights of Doria claim specimens which were tested were inadequate or that the testing was not in compliance with test methods promulgated by Caltrans. Mr. St. Claire, the tester, could not recall the numbers of samples or how many groups of samples were composited from the claims, nor could he be certain of this information from merely reviewing the test sheets. (RT 1724, 1728-29) However, it was clear that in his opinion the test results accurately showed the quality of the material. (RT 1749)

ARGUMENT.

I.

The District Court Found No Fraud and Its Findings Are Not Clearly Erroneous.

It should be apparent that Doria's compressed and selective version of testimony which lasted 20 court days is merely an attempt to reargue the merits. Doria's so-called charge of "fraud" was thoroughly ventilated in the district court. As the Ninth Circuit aptly noted after its review of the voluminous record, "The district court was more than patient in allowing Doria to put on its case. . . ." (Pet. Appen. "A," p. 3a) All the evidence elicited by Doria during twenty days of trial, was considered and weighed by the district court, after respondents jointly moved for dismissal under Rule 41(b) *F.R. Civ. Proc.* As the Findings show, Doria failed to prove that any fraud was practiced on the agency tribunal. (Pet. Appen. "D," pp. 31a-57a) From the detailed Findings, the district court concluded:

> "5. The Court finds and concludes that there was no intentionally false and misleading material evidence adduced by the defendants-contestants in the administrative proceedings and no fraud, *either extrinsic or intrinsic*, on the ALJ and the IBLA." (Pet. Appen. "D," p. 59a) (Emphasis added.)

The Ninth Circuit held that the district court was not clearly erroneous in its decision. This Court has frequently stated that the authority of an appellate court in reviewing findings is circumscribed by the deference it must give to decisions of the trier of fact who is usually in a superior position to appraise and weigh the evidence. *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 122, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1968).

II.

This Is Not a Case of "Fraud on the Court".

In the face of findings of the District Court regarding the fraud issue, Doria asserts this case is of "such fabric of fraud" as was considered by this Court in *Hazel-Atlas Company v. Hartford Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). Doria also relies on language in the cases of *Communist Party v. Subversive Activities Control Bd.*, 351 U.S. 115, 76 S.Ct. 663, 100 L.Ed. 1003 (1956) and *United States v. Shotwell Mfg.*, 355 U.S. 233, 78 S.Ct. 245, 2 L.Ed.2d 234 (1957). Doria also cites the commentary in 7 Moore, Federal Practice ¶ 60.37, which concerns the type of fraud supporting an independent action in equity to set aside a judgment.

Doria's argument regarding the importance of this case assumes that Doria proved the very facts which were decided adversely to it by the District Court. Respondents submit this is not a case of a deliberate, calculated plan to deceive a tribunal, such as the spurious article involved in *Hazel-Atlas*, or the newly discovered evidence upon which the government sought a remand in *Shotwell*. Rather, the genesis of this case was a mining contest — an adversary proceeding — before the ALJ in which both sides produced expert witnesses and in which considerable documentary evidence was presented pro and con on the issue of mineral validity of the Doria Mining claims. Doria focuses its claim of fraud essentially on one item of evidence, Exhibit 14A in the contest hearing. (Pet. Appen. "G," pp. 89a-93a) This exhibit was but one of thirty-nine exhibits introduced by contestants which included numerous photos, maps and assay sheets. Despite the voluminous evidence, Doria asserts that the laboratory test sheets which were not part of the Schroter mineral report, were somehow deliberately withheld. Doria asserts the testing was "blatantly improper

and illegal." Ignored, however, is the fact that despite the presence in evidence of Exhibit 14A, the administrative record reveals absolutely no cross-examination by Doria on the specifics of Schroter's sampling and testing procedure. See Findings No. 32 and 33, Petition Appen. "D," pp. 46a, 47a. This was an area open to inquiry — if counsel were interested — since Exhibit 14A clearly indicated the sand and gravel tests were run by the State materials laboratory, and that in the course thereof compositing was employed. Thus, while respondents deny the sampling and testing was improper, this is hardly a case of a wilful and deliberately planned imposture by Respondents such as was involved in *Hazel-Atlas* above.

Nor is this a case of admitted perjury or other tainted testimony as was involved in *Communist Party v. Subversive Activities Control Bd.* and *U.S. v. Shotwell, supra.* In both of these cases the purpose of the remand by this Court was to make certain that the lower tribunals based their findings on reliable evidence and to determine where the truth lay. Similarly, the purpose of the remand in *Doria I* was to give Doria an opportunity to prove its claim of fraud. Doria failed to sustain its burden, and on the record herein the case at bench cannot rationally be analogized to the facts in the *Communist Party* and *Shotwell* cases, *supra.* Doria strains logic and credulity in its attempt to do so.

Nor is this case of the same genre as *Bulloch v. United States,* 95 FRD 123 (DC Utah). In *Bulloch* the trial court made findings on numerous instances of the conduct of government agents acting in the course of their employment which was intentionally false or deceptive, and concluded that relief should be granted based on said findings. (*Id.* 95 FRD at 144) In the case at bench, of course, no such findings were made or could have been made. Doria can derive no support from *Bulloch.*

In this case as in *Wilkin v. Sunbeam Corp.* (10th Cir. 1972) 466 F.2d 714, we are concerned with documents, some of which the trial court deemed relevant and some irrelevant, and with credibility questions which the trier of fact has determined adversely to petitioner Doria. Respondents submit that the following concluding language in *Wilkin* is most applicable to Doria's case as it proceeded through all the levels of review herein:

> "Plaintiff has come forward with no new evidence which would change that holding. She has not sustained the burden of establishing fraud. Nothing which she has presented shows a defilement of the judicial process. The trial court patiently heard everything which she had to offer and with untiring industry analyzed her many claims. The denial of Rule 60(b) relief was not an abuse of discretion. On the record presented we are unable to see how the trial court could have reached any other result." (*Id.* 466 F2d at 717)

Conclusion.

Doria has had its day in court. The IBLA in its comprehensive opinion reviewing the evidence adduced on both sides, concluded there was no showing of mineral validity on the subject mining claims. The District Court, after remand, patiently heard Doria's protracted and largely irrelevant case of fraud, and found, also on substantial evidence, that no fraud existed in the agency proceedings. The Ninth

Circuit in *Doria II* affirmed. Doria has set forth no reasons for intervention by this court and respondents submit the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX I.

Decision.

State of California, et al., v. Doria Mining and Engineering Corporation, et al., United States, Intervenor.

IBLA 74-192 Decided October 31, 1974

Appeal from decision of Administrative Law Judge Graydon E. Holt (California Contest No. R-4873) declaring mining claims null and void.

Affirmed.

1. Mining Claims: Contests — Rules of Practice: Private Contests — Rights-of-Way: Generally — Special Use Permits

   The holders of special use permits and easements granting rights-of-way across mining claims have a sufficient adverse interest under 43 CFR 4.450-1 to initiate a private contest against mining claimants challenging the validity of the claims.

2. Administrative Practice — Administrative Procedure: Generally — Mining Claims: Contests — Rules of Practice: Private Contests — Intervention

   The United States Department of Agriculture may intervene in a private contest in the capacity of a contestant when the contest was initiated to ascertain the validity of mining claims situated in a national forest. The Government intervenor may be represented by counsel employed by the Department of Agriculture acting on behalf of the Forest Service and may attack the validity of the mining claims on the grounds disclosed by the private contestants' complaint.

3. Administrative Procedure: Adjudication — Contests and Protests: Generally — Mining Claims: Contests — Mining Claims: Determination of Validity — Rules of Practice: Private Contests

   A contest proceeding initiated to determine the validity of mining claims does not represent an unconstitutional administrative taking or condemnation of private property. This is true whether the determination of validity is made in a proceeding initiated by the Government or by private parties, for in either case the adjudication is made not by the party who initiated the proceeding but by the Department of the Interior, which has the authority, after proper notice and upon adequate hearing, to determine the validity of unpatented mining claims.

4. Mining Claims: Common Varieties of Minerals: Generally — Mining Claims: Discovery: Marketability

   In order to demonstrate a discovery on a placer mining claim located for a common variety of sand and gravel before July 23, 1955, it must be shown that the material could have been extracted, removed and marketed at a profit as of July 23, 1955.

5. Mining Claims: Determination of Validity — Mining Claims: Discovery: Generally

   Where contestees are seeking to validate a group of claims, they must prove that a valuable mineral deposit exists on each claim. A showing that all the claims taken as a group satisfy the requirements of discovery is not sufficient.

6. Mining Claims: Discovery: Generally

   Evidence of mineralization which might warrant further exploration work within a claim rather than development of a mine is not sufficient to constitute a discovery of a valuable mineral deposit.

7. Mining Claims: Discovery: Generally

   There has not been a discovery of feldspathic sands suitable for use in making glass where, although such mineral has been found with the limits of a claim, the evidence is not of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

8. Mining Claims: Common Varieties of Minerals: Generally — Mining Claims: Discovery: Marketability

   Where the preponderance of the evidence in a contest hearing does not show the existence of a reasonably continuous profitable market for a common variety of sand and gravel from a mining claim, from 1955 to the time of the hearing, the claimants have failed to show a discovery.

APPEARANCES: Joseph A. Montoya, Esq., Robert L. Meyer, Esq.. Hugh R. Williams, Esq., and Robert W. Vidor, Esq., Legal Division, Department of Public Works, Los Angeles,[1] for appellee State of California; David G. Moore, Esq., Reid, Babbage & Coil, Riverside, California, for appellee Calnev Pipe Line Company; Milnor E. Gleaves, Esq., Los Angeles, California, for the appellants; Charles F. Lawrence, Esq., Office of the General Counsel, Department of Agriculture, San Francisco, California, for the United States, Intervenor.

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[1]On June 25, 1973, the parties were given notice that pursuant to CAL. GOV'T CODE § 14008, the Department of Transportation succeeded to all the duties, powers, purposes, responsibilities and jurisdiction of the Department of Public Works, State of California, effective July 1, 1973, and effective that date assumed the position of said Department of Public Works as contestant in these proceedings. Counsel of record remained the same.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Doria Mining and Engineering Corporation, Richard H. Hutchinson, J. J. Schwietert and E. May Schwietert have appealed from a decision by Administrative Law Judge Graydon E. Holt, dated December 26, 1973, declaring appellants' eighteen 40-acre association placer mining claims null and void.

Appellants' mining claims were located between March 1, 1953, and July 22, 1955.[2] The claims are situated in Cajon Pass approximately halfway between Victorville and San Bernardino, and lie within the San Bernardino National Forest in secs. 14 and 23, T. 3 N., R. 6 W., S.B.M., California.

Appellee State of California claims an interest in sections 14 and 23 by virtue of a Highway Easement Deed issued by the United States on September 26, 1968.[3] Between 1968 and 1970, the State entered upon portions of sections 14 and 23 and constructed a highway commonly known as Interstate 15. This highway crosses over some of appellants' mining claims. The State's easement is subject to:

> (1) Outstanding valid claims, if any, existing on the date of this grant, and the Grantee shall obtain such permission as may be necessary on account of any such claims. [Ex. 1]

Appellee Calnev Pipe Line Company is a corporation engaged in the construction, maintenance and operation of pipeline systems for the purpose of transporting liquids. On January 1, 1961, and March 27, 1970, the United States

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[2]See Appendix A.

[3]The right-of-way was granted by the Department of Transportation under the authority of the Federal Aid Highway Act of August 27, 1958, *as amended*, 23 U.S.C. § 107(d) (1970). The Department of Agriculture, acting by and through the Forest Service, agreed to the transfer of the easement through the San Bernardino National Forest.

Department of Agriculture, Forest Service, issued Special Use Permits to Calnev for the construction of pipelines across portions of sections 14 and 23. In 1961, Calnev entered upon these sections and constructed a high pressure pipeline. In 1970, Calnev again entered the area and constructed another high pressure pipeline. The pipelines cross over portions of appellants' mining claims. Calnev's permits were "subject to all valid claims" (Exs. 2a, 2b).

On December 30, 1970, and January 5, 1971, appellants filed in the Superior Court of San Bernardino County complaints in inverse condemnation and trespass against Calnev and the State of California. In their complaints appellants alleged: (a) ownership of the 18 unpatented placer mining claims; (b) that Calnev and the State, in construction of the above-mentioned improvements, entered upon and took permanent possession of portions of land covered by the mining claims without permission and authority of appellants; (c) that the lands embraced within said mining claims contain valuable deposits of sand, gravel and precious metals; (d) that by reason of the construction and maintenance of the improvements, extraction of sand, gravel and precious metals within the area of the Easement Deed and Special Use Permits has been rendered impossible; and (e) extraction of minerals has been rendered practically and economically unfeasible upon remaining portions of the mining claims. Appellants prayed for damages against Calnev and the State in excess of $15,000,000.

On July 20, 1972, appellees initiated a private contest against appellants pursuant to 43 CFR 4.450. Appellees claimed that by virtue of the easement and permits noted above they were competing users, and claimed an interest adverse to appellants' interests in the lands embraced within the mining claims. Their complaint maintained that appellants' mining claims were invalid for the following reasons:

(a) There is not disclosed within the boundaries of said mining claims, and each of them, mineral materials of a variety subject to the mining laws sufficient in quantity, quality and value to constitute a discovery;

(b) The materials found within said mining claims, and each of them, could not have been mined, removed and marketed at a profit prior to the Act of July 23, 1955; and

(c) The land embraced within said mining claims, and each of them, is non-mineral in character.

Appellants filed an answer to the complaint stating that the 18 placer mining claims were valid. Appellants also filed a motion to dismiss the contest alleging that the contestants lacked standing to bring the action under the private contest provision cited above because neither the easement nor the permits created an interest "adverse" to the interests of the contestees. Judge Holt denied appellants' motion to dismiss.

On January 15, 1973, Charles F. Lawrence, Esq., Office of the General Counsel, United States Department of Agriculture, filed a notice of appearance on behalf of the United States requesting the right to intervene in the capacity of a contestant. The request was based on the Forest Service's determination that the proceedings directly concerned the status of land comprising a portion of the San Bernardino National Forest. Judge Holt granted the motion for intervention. Appellants' motion to set aside the order allowing intervention by the United States was denied. Thereafter, a hearing was held in Los Angeles, California, beginning on April 26, 1973.

The issues at the hearing narrowed to the questions of (a) whether there was a discovery of a valuable sand and gravel deposit on each claim as of July 23, 1955, and without substantial interruption up to the time of the hearing, and

(b) whether there was a discovery of a valuable deposit of feldspathic sand usable for glass manufacturing as of the time of the hearing.[4] Based on the evidence presented at the hearing, the Administrative Law Judge found that such discoveries did not exist and concluded that all 18 placer mining claims were therefore invalid. Accordingly, he declared them null and void.

On appeal, appellants press the following arguments:

1) The contestants have no property interest adverse to the contestees', which adverse interest is a prerequisite to standing to initiate a private contest; the contestants only have a license from the United States to cross national forest land, subject to existing rights. Also, by way of preface, appellants reassert their objection to the entry by the United States as intervenor in these proceedings.

2) The rights of the contestees in each claim are private property rights of which they may not constitutionally be deprived by other private parties in an administrative proceeding.

3) The Administrative Law Judge erroneously assumed that the contestees in a private contest have the burden of proving the validity of their claims.

4) The contestants failed to establish by a preponderance of the evidence that the claims are invalid.

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[4]The Judge did not make any determination regarding the charge that the land was nonmineral in character. In his decision, at 2, he had the following to say:

> If there has been a discovery of a valuable mineral deposit, the land must necessarily be mineral in character. If there has not been such a discovery on a claim, the claim is void. Although each 10-acre subdivision must be mineral in character, the determination in this case will be based on the question of discovery not on the mineral character of the land. Accordingly, the third charge is dismissed.

5) The Administrative Law Judge improperly denied the contestees' motion to reopen the hearing for the receipt of further evidence.

In their initial argument on appeal, appellants maintain that the contestants' easement and special use permits are not interests "adverse" to the interests of appellants within the meaning of 43 CFR 4.450-1. Accordingly, they argue that the contestants lack standing to initiate a private contest. We do not agree. 43 CFR 4.450-1 reads as follows:

> *By whom private contest may be initiated.* Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the act of May 14, 1880, as amended (43 U.S.C. 185), or the act of March 3, 1891 (43 U.S.C. 329), may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations herein.

In *Duguid v. Best*, 291 F.2d 235 (9th Cir. 1961), *cert. denied*, 372 U.S. 906 (1963), the Court of Appeals held that pursuant to the above regulation[5] the holder of a special use permit granted by the Forest Service, Department of Agriculture, which permitted construction of a dam and spillway on national forest land, could initiate a private contest to determine the validity of a mining claim in conflict

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[5]With minor variation, the regulation was at that time codified at 43 CFR 221.51.

with the special use permit.[6] The facts in that case are strikingly similar to the situation presented in this proceeding. In *Duguid*, the Paradise Irrigation District was granted a permit "subject to all valid claims." Subsequent to the grant of the permit, the District, without the consent of the mining claimants, took possession of a portion of the mining claim and proceeded to construct a dam and spillway thereon. The claimants then instituted an action against the District in the Superior Court of the State of California alleging unlawful taking of private property. Thereafter the District filed in the California Land Office, Bureau of Land Management, a complaint against the mining claimants as a private contest seeking an adjudication by the Bureau of the validity of the mining claim. The District's complaint alleged that its special use permit entitled it to use the lands specified in its permit, that the mining claimants were asserting an adverse claim, and that the lands within the mining claim were nonmineral in character and contained minerals insufficient to constitute a discovery. The Court of Appeals held that under such circumstances the initiation of a private contest by the District was proper.

[1] A similar conflict of interest exists in the present proceeding. To the extent that a multi-lane, major freeway and high-pressure pipelines cannot co-exist with the mining of sand and gravel and other minerals on the subject claims,

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[6] *See also Thomas v. DeVilbiss*, 10 IBLA 56, 57 (1973), holding that the owner of a grazing lease under section 15 of the Taylor Grazing Act of 1934, *as amended*, 43 U.S.C. § 315 (1970), had a sufficient adverse interest under 43 CFR 4.450-1 to initiate a contest against a mining claimant alleging lack of discovery of valuable minerals; and *Sedgwick v. Callahan*, 9 IBLA 216, 223 (1973), holding that surface patentees under the Stock-Raising Homestead Act of 1916, *as amended*, 43 U.S.C. § 291 *et seq.* (1970), had an adverse interest sufficient to bring a private contest against mining claimants. *See also United States v. Howard*, 15 IBLA 139 (1974); *City of Phoenix v. Reeves*, 14 IBLA 315, 81 I.D. 65 (1974).

the interests of the State and Calnev are clearly "adverse" to the interests of the appellants within the meaning of 43 CFR 4.450-1.[7] Appellees are entitled to bring an action in the Department to determine whether discoveries have been perfected on appellants' unpatented mining claims so that appellees may know the proper course to follow in protecting their interests in the land. Accordingly, we conclude that the appellees have standing to bring this private contest.

[2] Appellants further object to the United States Department of Agriculture intervening in the contest in the capacity of a contestant. Intervention was clearly proper as the Department of Agriculture was a party whose interests were affected by the proceedings. *See United States v. McCall*, 2 IBLA 64, 75, 78 I.D. 71 (1971). When lands within national forests are not valuable for their mineral deposits, the Forest Service is entitled to the free and unrestricted possession and control of the lands in order to properly administer them as the law directs. Accordingly, if the Department of Agriculture determines that it has an

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[7]The record indicates that in 1960 appellant J. J. Schwietert, then owner of all 18 claims, executed a waiver of rights to surface use thereof (Exs. C, D, E) under the provisions of section 6 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 614 (1970). By such voluntary relinquishment, Mr. Schwietert gave the United States the right to manage and dispose of the vegetative surface resources on the claims and to manage other surface resources thereof. But as correctly pointed out by appellants, section 4 of the Act, 30 U.S.C. § 612 (1970), provides that,

> any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto * * *.

Section 6 further provides that,

> no such waiver or relinquishment shall be deemed in any manner to constitute any concession as to the date of priority of rights under said mining claim or as to the validity thereof.

Thus, the relinquishment of surface use under this Act has not removed the conflict between the parties.

administrative need to ascertain its right to certain lands upon which mining claims are located, then it is entitled to have that right adjudicated, and that duty devolves upon this Department. *United States v. Bergdal*, 74 I.D. 245, 252 (1967); *H. H. Yard*, 38 L.D. 59, 66-67 (1909). The purpose of this private contest was to ascertain the validity of mining claims lying in a national forest. The initiation of such a proceeding could have been recommended by the Forest Service pursuant to the Memorandum of Understanding executed by the Bureau of Land Management and the Forest Service, effective May 3, 1957. VI BLM Manual 3.1 (June 21, 1962). Had such a separate proceeding been brought, it could have been consolidated with the private contest. *Marvel Mining Co. v. Sinclair Oil and Gas Co., United States v. Marvel Mining Co.*, 75 I.D. 407, 410 (1968). Whether done by consolidated proceedings or by intervention, the substance of the action is the same. Furthermore, the Government intervenor may attack the validity of the mining claims on the grounds disclosed by the private contestants' complaint. *Jebson v. Spencer*, 61 I.D. 157, 169 (1953). It was also proper for the Government to be represented by counsel employed by the Department of Agriculture acting on behalf of the Forest Service. *United States v. Ramsher Mining and Engineering Co.*, 14 IBLA 32, 36 (1973). *See also* 43 CFR 1862.4.

[3] Appellants' second allegation of error is also without merit. If an unpatented mining claim is invalid, compensation is not required because "no right arises from an invalid claim of any kind," and thus nothing is taken from the claimant. *Cameron v. United States*, 252 U.S. 450, 459-60 (1920). This is true whether the determination of invalidity is made in a proceeding initiated by the Government or by a private party. In either case the adjudication is made not by the party who initiates the proceedings, but by au-

thorized representatives of the Department of the Interior. *See Duguid v. Best, supra* at 241. It has been argued before that such validity proceedings are unconstitutional administrative takings or condemnations of private property. The courts, however, have recognized that the Department of the Interior has plenary power in the administration of public lands, and as part of that power the Department has the authority, after proper notice and upon adequate hearing, to determine the validity of unpatented mining claims. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Cameron v. United States, supra; Converse v. Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969); *Davis v. Nelson*, 329 F.2d 840 (9th Cir. 1964). *See also United States v. Howard*, 15 IBLA 139, 143 (1974); *United States v. Northwest Mine & Milling, Inc.*, 11 IBLA 271, 272-73 (1973); *United States v. Dummar*, 9 IBLA 308, 309 (1973).

In their third and fourth arguments, appellants generally maintain that the Administrative Law Judge's decision was incorrect as it was based on the improper assumption that the contestees had the burden of proving the validity of their claims. Appellants argue that the contestants were required and failed to prove by a preponderance of the evidence that the claims were invalid.

We note that while in a private contest the party bringing the action generally has the burden of preponderating on the disputed issue, *Marvel Mining Co. v. Sinclair Oil and Gas Co., supra* at 423, when the Government intervenes as a contestant the proceeding then becomes analogous to any other government contest where we have held that the contestant need only show a prima facie case of invalidity. The burden then shifts to the mining claimant to show by a preponderance of the evidence that the claims are valid. *United States v. Clear Gravel Enterprises, Inc.*, 2 IBLA

285, 301 (1971); *see Foster v. Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959).

In any case, the issue is without consequence because regardless of which party the Judge placed the burden of proof upon, the evidence presented by the private contestants clearly established the invalidity of the subject mining claims. The thrust of contestants' evidence wholly negated the existence of a discovery on any of the claims. Thus, we find that the Judge's conclusion that the claims are invalid is supported by a preponderance of the evidence in the record. As the appellants essentially contend that the Judge's decision is contrary to the evidence, we shall set forth the salient points adduced at the hearing.

The contestants' first witness was Austin Schroter, a consulting geologist and mining engineer with 35 years of experience in various positions in the mining industry (Tr. 76). Mr. Schroter made a mineral evaluation study of the claims to see if there were valuable minerals of any kind. During his examination he was aided by Dr. Robin Willis, an engineering and petroleum geologist, T. A. DeVore, a metallurgical engineer, Charles A. Lee, a geologist, John F. Schroter, an engineering technician, and Frank Nevin, an engineering geologist (Tr. 98).

In the spring of 1972, Schroter and his aides undertook a sampling program on each of the claims (Tr. 124-25). Samples were taken from each claim at an average depth of 10 to 12 feet. Each sample was then coned, quartered down and split into four sections. One quarter was screened and weighed on the ground to determine the sand to gravel ratio, a second quarter was submitted for laboratory analysis, the third quarter was retained for examination for precious metal content, and the last quarter was reserved for examination by interested parties, such as the contestees (Tr. 127).

In a laboratory analysis, Schroter tested the samples from the claims to determine their sand to gravel ratios, their resistance to abrasion (L. A. Rattler Test), and their sand and silt content (Sand Equivalent Test) (Tr. 135-36). The test results indicated that the material on the claims did not meet minimum specifications required for commercial aggregate in the industry as of July 23, 1955, or for any period thereafter (Tr. 135, 142, 147, Ex. 14a).

In addition to the sand and gravel study, the claims were examined for precious metals. Samples from each of the claims were panned to a concentrate and no gold or silver was observed in particulate form (Tr. 147-48). The samples were also subjected to fire assay (Exs. 15a, 15b, 15c) and again the quality of gold and silver did not approach commercial significance on any of the claims (Tr. 153, 264). Assays for precious metals were performed both by Mr. DeVore and by the Union Assay Office of Salt Lake City, Utah (Tr. 151, Exs. 14b, 14c, 14d). No metals of any value were found. Schroter testified that the claims were examined for any type of commercial mineral whatsoever: oil, gas, gold, silver, platinum, industrial minerals, feldspar, orlithium, zirconium, vanadium, etc., "any commercial mineral whatever, we looked for," (Tr. 222), but nothing of commercial value was discovered.

In addition to the mineral examination, Schroter did an extensive sand and gravel marketing study. He determined that the relevant trade territory extended to San Bernardino, 20 miles to the south, and Victorville, 20 miles to the north (Tr. 200-01). Schroter interviewed sand and gravel producers who were supplying this area and acquired information regarding the quality and quantity of the materials they produced both at the present time and at the time that common varieties of sand and gravel were withdrawn from location. He also received information regarding haulage

rates, market prices, costs of production and the extent of demand for sand and gravel in the trade territory (Tr. 205-07).

Schroter determined from his investigation that except for State highway projects underway during 1953-55 and 1968-70, there were no major public projects under construction requiring significant amounts of aggregate within a reasonable distance from the subject claims (Tr. 221). During the periods of limited demand when no State highway construction occurred, local producers in San Bernardino and Victorville were supplying high quality sand and gravel for use in residential construction, streets and highways, manufacture of sewer pipe, manufacture of ready-mix concrete, and manufacture of transit mix concrete (Tr. 221).

The evidence presented at the hearing was *inclusive* regarding whether material from the subject claims was suitable for use in the construction of the State highways. Schroter testified that he examined State highway records which indicated that the material in sections 14 and 23 was unsuitable for use as mineral aggregates for road construction (Tr. 161). The State records indicate that land outside of the area of the claims, in sections 13 and 23, was used as a borrow pit for embankment material and for other low-grade material requirements (Tr. 196-97). The appellants argued that the material on the claims was suitable for highway construction as the State had waived its specification requirements when marginal quality material was in close proximity to the highway project (Tr. 1223).

In summary, Schroter determined that the sand to gravel ratio on the claims was not in proper balance and was below minimum standards for commercial grade aggregate, the claims were at a mileage disadvantage compared to established commercial producers both in San Bernardino and Victorville, there was no proven use or production record

for the materials on the claims, the established producers were adequately supplying the needs of the relevant market area with better quality material, and no other valuable minerals existed on the claims which could be produced at a profit (Tr. 224-26). Based on an analysis of the foregoing factors, Schroter concluded that the deposits on the subject claims as of July 23, 1955, and up until the time of the hearing, could not have been mined, processed, removed and sold at a profit in a sand and gravel operation alone, or in a sand and gravel operation combined with production of a valuable mineral byproduct (Tr. 225, 226, 231, 1267).

Contestants' second witness was George Thwing, Jr. Mr. Thwing received a degree in civil engineering in 1928, and worked in the mining industry until 1938 when he went into the sand and gravel business. He operated the Triangle Rock and Gravel Company in San Bernardino, which produced sand and gravel and ready-mix material (Tr. 324-25). In 1973 he retired from the company and is currently operating as a business consultant. He was retained by the contestants to make a study of and form an opinion on the probability of developing a profitable sand and gravel operation from the lands covered by the subject claims as of July 23, 1955 (Tr. 328). He examined Schroter's test results, investigated the quality of and supply and demand for sand and gravel in the market area, haulage rates, availability of water for processing, specifications for commercial aggregate, quality and quantity of material on the claims, and concluded that it would not have been feasible to put a commercial plant on the site and operate in the market that was existing in 1955, or thereafter (Tr. 330, 345-46, 362). He determined that the only possible use for the material on the claims would be for lowgrade fill material (Tr. 380).

Contestants' final two witnesses were Edward J. Curtin and Robert E. Hove. Mr. Curtin has been in the sand and

gravel business for 18 years and is presently employed as manager of technical services for Owl Rock Products Company. Prior to this job he was employed by Owl Service Rock Company in San Bernardino (Tr. 441-42). Curtin testified that contestee Richard Hutchinson approached Owl Service Rock Company in 1967 with an offer to use the sand and gravel on the subject claims for construction of aggregates to be used in connection with the upcoming bids for the Interstate 15 highway project (Tr. 445). Owl sampled the area and then entered into an option agreement which for $1,000 granted the right to remove 500,000 tons of material at a rate of 9¢ per ton for the first 100,000 tons, and 8¢ per ton thereafter (Tr. 450). Owl solicited all the general contractors who were bidding on the job but was unsuccessful in securing a contract. Curtin testified that Owl was not interested in the material for anything other than the highway project, and thus chose not to exercise the option (Tr. 457). He also expressed the view that based on his experience in the industry, a commercial aggregate operation could not have been installed within the area of the subject claims as the quality of the material was poor and the market was adequately covered by other producers (Tr. 457-58).

Mr. Hove is the owner-operator of a ready-mix concrete and aggregate plant, Hi-Grade Materials Company, in Lucerne, California. He has been in operation since 1955 and Victorville is part of his marketing area (Tr. 472-73). He testified that in 1969 he was approached by contestee Hutchinson regarding development of aggregates on the subject claims. He sampled the area and had the samples sent to the CHJ Materials Laboratory, Inc., San Bernardino, for testing (Tr. 478). The test results indicated that the quality of the material was too poor for commercial production, and accordingly no agreement was executed (Tr. 482, Ex.

25).

For the appellants, both contestee Hutchinson and J. J. Schwietert testified that in their opinion the subject claims could be commercially exploited (Tr. 556-76, 1180-88). Schwietert testified that for a period of ten years he had been stockpiling material from the claims for the purpose of seeing what materials were on the claims and to sell such material if he could find a willing buyer (Tr. 570-72). He never analyzed the quality of the material nor did he sell any of it, but he stated that the gave it away to friends for use as foundation material (Tr. 576). James Maxwell Muir, Jr., President of King Solomon Mining Corp., testified that in his opinion it would have been commercially feasible in 1955 to install a $1,200,000 mill producing 600 tons per day of aggregate material (Tr. 1061-65). He offered no market or cost analyses to justify why such a project would have been commercially feasible.

Shortly before the hearing, the Hazen Research Company, Golden, Colorado, a mining exploration and consulting organization, was retained by the contestees to investigate the claims to determine what minerals could be produced. The conclusion of the Hazen Report (Ex. B) is that sand and gravel on the claims can be used in aggregates and that feldspathic sand in the fines can be used in the manufacturing of glass. The Hazen Report was prepared by William T. Hamling, David D. Billings, and Ralph Paul Meyertons.

Hamling is a mining engineer employed by the Hazen Company. His assignment was simply to take samples from the claims; he did not analyze the material nor did he make any investigation as to its marketability (Tr. 540-41). From two of the claims, the Outlook and Old Sunny, Hamling removed large, 120-gallon samples of material. From the remaining 16 claims he took smaller, 5-gallon samples; in

some instances these latter samples represented 3-foot deep streambed excavations. Hamling testified that the time allotted for sampling was not sufficient to allow drilling a hole on each claim, but he was of the opinion that such drilling was unnecessary as the material in the general area did not appear to vary greatly from one claim to the next (Tr. 530-31).

Billings is a self-employed glass technologist who was called in to work with the Hazen Company to determine if suitable feldspathic sand products could be extracted for use in the glass industry (Tr. 612-20). He examined ¼ pound of material from the large samples (Tr. 760). Based on his examination, he was of the opinion that given a 60% recovery rate from the bank-run material, it would be feasible to produce feldspathic sands for use in the Los Angeles glass industry (Tr. 631-33).

On cross-examination, Billings' opinion as to the commercial feasibility of producing feldspathic sands became fraught with qualifications and contingencies. He noted that he had made no estimate of the cost of setting up a plant (Tr. 652), he had not considered the cost of stripping overburden (Tr. 795), nor the costs of disposing of waste (Tr. 794). He assumed an ample water supply (Tr. 655), and also assumed that the quality of the material did not differ at different depths (Tr. 767). He did not know whether there were ample reserves on the claims (Tr. 647).

He made two very significant qualifications for the purposes of this decision. First, he did not analyze any of the 16 small samples and thus could only speculate and draw inferences as to the feldspathic sand quality on 16 of the claims. In these instances he recommended further sampling and testing to determine the quantity and quality of feldspathic material (Tr. 775). On cross-examination he was asked:

Q. Sir, as a glass technologist, would you consider a mere visual inspection of samples from a potential site sufficient to advise a client whether or not the material would be acceptable as a glass sands component in a glass batch operation?

A. No.

(Tr. 696).

Second, he noted that the relevant glass sand market was being supplied by an operation at Mission Viejo near Capistrano and by an operation at Del Monte, California. The Mission Viejo mine, which at the time of the hearing was shut down for an indefinite period, served approxmattely 75% of the market (Tr. 803), and had estimated reserves for a 50-year period (Tr. 647). Billings testified that given the market situation, a successful glass sands operation was contingent upon getting long-term commitments from potential customers (Tr. 776). He recommended that before investing any money in such an operation, it would be advisable to determine when the Mission Viejo mine was going back into production (Tr. 637), and to have potential customers examine the material on the subject claims to see if it fit their particular needs (Tr. 630, 780). Neither the appellants nor the Hazen Company contacted any producers or users of feldspathic sand to determine whether the products from the subject claims could be marketed. Billings testified that a plant capable of processing 100 tons per day would have cost $250,000 to $350,000 in 1955 (Tr. 662). James Maxwell Muir, Jr. placed the cost of a plant at $2,000 per ton in 1955 and $3,000 per ton in 1973, or $1,200,000 and $1,800,000, respectively, for a 600 ton per day plant (Tr. 1061, 1064). Schroter testified that a 100 ton per day plant producing both sand and gravel and feldspathic sand would cost $850,000 (Tr. 1284).

Meyertons is a mining and metallurgical engineer employed by the Hazen Company (Tr. 816). Meyertons tes-

tified that he visually examined the 16 small samples and was satisfied that the mineral content would be reasonably the same for sample to sample (Tr. 846). He did note, however, that had there been more tim he would have further analyzed the 16 small samples (Tr. 859). Following an initial analysis of the two larger samples, Meyertons decided to abandon the search for gold, silver and other precious metals (Tr. 882), and limit the examination to feldspar products (Tr. 883). Meyertons sent a portion of the large samples to Pacific Materials Laboratory, Inc., Bloomington, California, for an evaluation of the suitability of the material for use as an aggregate (Tr. 829). The test results indicated that the material was of poor quality (Ex. 27).

Meyertons testified that the Hazen Report showed that the feldspathic sand found in the samples tested was of sufficient quality to be used in the glass industry. He noted, however, that the potential inaccuracy in the total feldspar determination could be as much as 20% on the samples tested (Tr. 938), and that additional variances could occur with respect to the 16 untested samples. Accordingly, he recommended additional sampling and testing of the materials on the claims (Tr. 859, 945-46). A flow sheet was developed to show in a preliminary fashion how products could be produced in a sand and gravel and glass sand operation (Tr. 836). The report was in essence a technical feasibility study, not a marketability study.

Appellants' last witness was J. Mark Longfield. Mr. Longfield is a consultant for construction aggregate business and has been involved in the sand and gravel industry since 1964 (Tr. 1219). His opinion was limited to the marketability of sand and gravel only. Longfield viewed the claims and in his opinion the material thereon was "marginal" (Tr. 1222). After studying the relevant market he testified that aside from the highway projects, very little demand existed

in the Victorville area until 1965, and while there was some activity in the Hesperia-Apple Valley area, this was adequately covered by local producers (Tr. 1238). He also testified that appellants could not compete in the San Bernardino area because the rock being supplied there was of superior quality. Based on these factors he concluded that a sand and gravel operation could not have been profitable either in 1955 or at any time up to the hearing (Tr. 1241). He did testify, however, that an operation might be successful if a co-product was produced in conjunction with sand and gravel (Tr. 1241). He was not an expert, however, with regard to the production of feldspathic sand and stated that he had no opinion as to whether in 1955 a sand and gravel and feldspathic sand operation could have produced and sold material at a profit (Tr. 1251).

The basic principles of law applicable to this case are now well established and need no extensive elaboration. For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. A discovery exists

> * * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *.

Castle v. Womble, 19 L.D. 455, 457 (1894); *United States v. Coleman*, 390 U.S. 559 (1968). This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed and presently marketed at a profit, the so-called marketability test. *United States v. Coleman, supra*. This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, *bona fides* in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held

to be applicable in determining the validity of sand and gravel claims. *Palmer v. Dredge Corp.*, 398 F.2d 791 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969); *Foster v. Seaton, supra*.

[4] The parties to this proceeding stipulated that the sand and gravel on the claims was to be treated as a common variety material located prior to the withdrawal of such materials (Tr. 144-45). Since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955, 30 U.S.C. § 611 (1970), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, has been met by that date. *United States v. Barrow*, 404 F.2d 749 (9th Cir. 1968), *cert. denied*, 394 U.S. 974 (1969); *Palmer v. Dredge Corp., supra; United States v. Clear Gravel Enterprises, Inc., supra*. This entails a showing of the market which then existed, the cost of extraction and processing which would have been incurred, the transportation charges which would have been involved, the unit price which then prevailed and the profit which the claimants might have realized if they had elected to proceed at that time. *United States v. Gibbs*, 14 IBLA 382, 391 (1973).

The evidence presented at the hearing clearly established that the sand and gravel on the subject claims was of inferior quality and was not acceptable for the type of work being done in the relevant market from the period 1955 to the hearing. During that period deposits of superior quality were being actively exploited in the area and there was only a limited local demand for sand and gravel. Under such circumstances, no discovery of sand and gravel existed on appellants' claims. *Barrows v. Hickel*, 447 F.2d 80, 83 (9th

Cir. 1971). It is of no consequence that appellant Hutchinson gave material from the claims to his friends at no cost. It has been held that the disposal of substantial quantities of sand and gravel at no profit does not demonstrate the existence of a market for the material which would induce a man of ordinary prudence to expend his means in an attempt to develop a mine on his claims. *Barrows v. Hickel, supra.*

The above finding disposes of the contestees' assertion that the Calnev and State rights-of-way are in derogation of their mining claims. The rights-of-way were granted in 1961, 1968 and 1970. Since the mining claims during those periods (and beyond) were at most valuable only for sand and gravel, the finding that the claims were invalid as sand and gravel claims as of the dates when the rights-of-way issued requires a conclusion that the claims, even if later validated, would be subject to the rights-of-way and not vice versa as the contestees contend.

[5] The land, however, remained open to mineral location subject to the rights-of-way. *See A. W. Schunk*, 16 IBLA 191, 195 (1974); *Solicitor's Opinion*, 67 I.D. 225, 228 (1960). Therefore, we must examine whether a discovery after 1970 validated the claims. The only valuable mineral suggested by the record is the possibility of a discovery of feldspathic sands suitable for making glass. For this purpose we assume that sands suitable for glassmaking are NOT a common variety material. *United States v. Kosanke Sand Corp.*, 12 IBLA 282, 305-08, 80 I.D. 538, 549 (1973); *United States v. Pierce*, 75 I.D. 270, 281 (1968). Two requirements of law dispose of this issue. First, where mining claimants are seeking to validate a group of claims, they must show that a valuable mineral deposit exists on each claim. A showing that all of the claims taken as a group satisfy the requirements of discovery is not sufficient. *United States v. Colonna and Company of Colorado, Inc.*,

14 IBLA 220, 226 (1974); *United States v. Harper*, 8 IBLA 357, 368 (1972). Here, only material from two of the claims was actually analyzed by the Hazen Company. Appellants' experts admitted that variations in the quality and quantity of feldspathic sands could occur on the remaining 16 claims. It is axiomatic, we believe, that prudent men do not invest their money in attempting to develop a mine without some evidence that the mineral which they seek to exploit exists in such quality and quantity as to permit the recovery of their capital outlay with a profit. Accordingly, it was proper to conclude that the 16 unanalyzed claims were not shown to have a discovery of a valuable deposit of feldspathic sands.

[6] Second, the Department recognizes a distinct difference between exploration and discovery under the mining laws. Exploratory work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are of low value, there must be more exploration work to determine whether those minerals exist in such quantity and quality that there is a reasonable prospect of success in developing a paying mine. Only when the exploratory work shows such a reasonable prospect of success can it be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. *United States v. Converse*, 72 I.D. 141, 149 (1965), *aff'd, Converse v. Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969). In this proceeding, all of appellants' experts testified that their examinations were preliminary and that further testing would have to be accomplished before recommending that production occur on any of the claims. Appellants were thus still at the explor-

atory stage. We note again that appellants had not yet reached the stage of developing an analysis of the marketability of the feldspathic sands on the claims. As Administrative Law Judge Hold said in this decision (at 8):

> The Hazen report is based on a chemical analysis of one sample from one claim and a visual examination of samples from each of the other claims. The flow sheet and plan of operation require the utilization of the sand and gravel for all purposes. Since the Department has held that the common variety materials can not be used, it is only the feldspathic sand that is subject to location. There was no evidence that this latter material could be economically utilized by itself and no attempt has been made to determine whether it could compete in the existing market. No prudent man would invest his time and means developing any one of the claims until the technology of processing the feldspathic sand has been completed and a reasonably accurate estimation has been made of the cost of production. Until this has been completed there is no way of determining whether the material could compete in the existing market.

[7] There has not been a discovery of feldspathic sands suitable for use in making glass where, although such mineral has been found within the limits of the claims, the evidence is not of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with the reasonable prospect of success in developing the property. *United States v. Duval*, 1 IBLA 103 (1970), *aff'd Duval v. Morton*, No. 72-2839 (9th Cir. December 19, 1973), *aff'g Duval v. Morton*, 347 F. Supp. 501 (D. Ore. 1972). Accordingly, we conclude that all of

the claims were properly declared null and void.[8]

[8] In their final argument on appeal, appellants charge that the Administrative Law Judge improperly denied their motion to reopen the proceedings for the purpose of introducing new evidence. Appellants allege that they have evidence that will establish the fact that the State of California and its contractors used substantial quantities of sand and gravel from appellants' claims during the course of the construction of the highway projects in 1954-55 and 1968-70. In denying the motion, Judge Holt stated the following:

> In the recent decision of *United States v. A. E. Kottinger, et al.*, 14 IBLA 10 (November 27, 1973), the Board held (syllabus):
>
> > Where the preponderance of the evidence in a contest hearing does not show the existence of a reasonably continuous profitable market for a common variety of sand and gravel from a mining claim, from 1955 to the time of the hearing, the claimants have failed to show at discovery.

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[8] In their brief on appeal, appellants place great reliance on *United States v. Kosanke Sand Corp.*, 3 IBLA 189 (1971), which upheld the validity of claims located for feldspathic sands. That decision was later set aside and remanded by this Board. *United States v. Kosanke Sand Corp.*, 12 IBLA 282, 80 I.D. 535 (1973). The facts in the *Kosanke* proceeding are clearly distinguishable from the ones at hand. In *Kosanke*, the exploration of the claims, technique for processing of the sand, existence of a possible market, suitability of the sand for use in glass-making, all had progressed much further than in this case, yet *Kosanke* was remanded for a hearing to develop further evidence as to the quality and quantity of the silica sand on each claim, the amount of each grade of sand on each claim, the market for each grade, the proposed flotation process for beneficiating the silica sand, and transportation costs. The evidence in this case falls so far short of that offered in *Kosanke* as to leave no doubt that the validity of the claims has not been established.

This ruling was supported by both administrative and judicial decisions.[9]

Under the *Kottinger* decision it was incumbent on the contestees to establish that there was a "reasonably continuous profitable market" for the sand and gravel on the claims for 1955 and 1972. Assuming that there was a profitable market for the sand gravel on one or more of the claims for the periods 1954-1955, and 1968-1970, the gap between 1955 and 1968 is fatal to the contestees' contention of validity.

Accordingly, the motion to reopen the hearing is denied.

For the reasons stated, the Judge was correct in denying appellants' motion.

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[9]In *Kottinger, supra* at 13, we quoted the following from *United States v. Charleston Stone Products*, 9 IBLA 94, 100 (1973):

> [T]he contestee must also establish that in the interval from the date of the withdrawal of common varieties of sand and gravel from mineral location to the date of the contest proceedings a market for the * * * mineral has continued without any prolonged interruption * * *. [I]f the marketability of the common variety mineral for which the claim was located is lost, the validity of the location is similarly lost * * *. *United States v. Estate of Alvis F. Denison*, 76 I.D. 223 (1969); *Mulkern v. Hammit*, 326 F.2d 896 (9th Cir. 1964). [L]ater recovery of a profitable market cannot serve to resuscitate such invalid claims.

Judicial review of the *Charleston* case has been sought, *Charleston Stone Products Co., Inc. v. Morton*, Civil No. LV-2039-BRT, currently pending before the United States District Court for the District of Nevada. *See also United States v. Johnson*, 16 IBLA 234 (1974); *United States v. Winegar*, 16 IBLA 112, 81 I.D. 370 (1974).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

/s/ Martin Ritvo,
Martin Ritvo
Administrative Judge

We Concur:

/s/ Douglas E. Henriques
Douglas E. Henriques
Administrative Judge

/s/ Edward W. Stuebing
Edward W. Stuebing
Administrative Judge

APPENDIX A.

	Name	Date of Location	Legal Description
1)	SAND BANK	March 1, 1953	NW 1/4 of NW 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
2)	HARBOR	March 1, 1953	SW 1/4 of NW 1/4 Sec. 14, T. 3 N., R. 6 W., SBM
3)	MANY STONES	March 1, 1953	NW 1/4 of SW 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
4)	WILD TRAIL	March 1, 1953	SW 1/4 of SW 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
5)	BUCK SHOT	March 1, 1953	NE 1/4 of SW 1/4 Sec. 14, T. 3 N., R. 6 W., SBM
6)	OLD SUNNY	March 1, 1953	SE 1/4 of SW 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
7)	OUTLOOK	January 5, 1955	NE 1/4 of NW 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
8)	DELIGHT	January 5, 1955	NW 1/4 of NE 1/4 Sec. 14, T. 3 N., R. 6 W., SBM
9)	SUNSHINE	January 5, 1955	NE 1/4 of NE 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
10)	BALDY	January 5, 1955	SE 1/4 of NE 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
11)	HAWK	January 5, 1955	SE 1/4 of NE 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
12)	OLD BLISTER	March 1, 1953	NE 1/4 of SE 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
13)	CLEAR VIEW	March 1, 1953	SW 1/4 OF SE 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
14)	BUSTER	March 1, 1953	SE 1/4 of SE 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
15)	LIZARD GULCH	July 12, 1955	NE 1/4 of NW 1/4, Sec. 23, T. 3 N., R. 6 W., SBM
16)	MESQUITE	July 12, 1955	NW 1/4 of NW 1/4, Sec. 23, T. 3 N., R. 6 W., SBM
17)	BARREN	July 12, 1955	SW 1/4 of NW 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
18)	RATTLER	July 12, 1955	SE 1/4 of NW 1/4, Sec. 23, T. 3 N., R. 6 W., SBM